IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1147

LOCAL 1576,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.
Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF SOUTHERN STEVEDORING CO.

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Southern Stevedoring Co. respectfully requests leave to file an amicus curiae brief in support of the petition for a writ of certiorari in this case. In support of this motion, Southern Stevedoring states as follows:

1) The company requested the consent of all parties to the filing of this brief. Consent was given by the attorneys for petitioner Local 1576, ILA, and for respondent Local 307, ILA. In addition, the Solicitor General of the United States gave his consent on behalf of the EEOC. However, the attorney for respondent Local 851, ILA, refused to consent to the filing of this brief.

2) The interest of Southern Stevedoring Co. in this case arises from the fact that Southern employs most of the members of Local 1576 at the port of Galveston,

Texas. The company hires these workers primarily to unload bananas, a highly competitive business which demands knowledgeable and productive workers. The members of Local 1576 are specialists in this kind of work and if the Fifth Circuit's order requiring a merger of all the ILA locals in Galveston is implemented, this specialized workforce will be lost. The resulting adverse impact on both Southern Stevedoring and Local 1576 will be substantial.

3) Because Southern Stevedoring is more knowledgeable than the other parties about what the adverse impact of the Fifth Circuit's merger order will be, the facts and analysis set forth in this amicus curiae brief will assist the Court in determining whether the petition for a writ of certiorari should be granted.

WHEREFORE, it is respectfully requested that this motion be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February ____, 1981 this motion and the attached amicus curiae brief were served by first class mail, postage prepaid, on the following:

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AMICUS CURIAE BRIEF

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STATEMENT OF INTEREST

Southern Stevedoring Co. wishes to file an amicus curiae brief in support of the petition for certiorari in this case because Southern believes that the Fifth Circuit's order will have a serious adverse impact on the members of the petitioner local and on the company's business. Southern Stevedoring employs members of Local 1576 to unload bananas at the port of Galveston, Texas. Local 1576 is the only local union which Southern uses to unload bananas and Galveston is the only port where Southern performs this work.

The work of unloading bananas is highly competitive and must be done in an extremely efficient manner in order to ensure a margin of profit and the freshness and quality of the product. Members of Local 1576 are specialists in this kind of work and are extremely adept at it. The Fifth Circuit's order requiring Local 1576 to merge with three other International Longshoremen's Association (ILA) locals in Galveston will destroy this specialization and severely harm Southern's ability to adequately serve its customers. Thus, the company has a real interest in the outcome of this case and wishes to urge this court to act favorably on Local 1576's petition.

SUMMARY OF ARGUMENT

The petition for certiorari in this case seeks review of a Fifth Circuit decision ordering a union to merge its members, its specialized work jurisdiction, its seniority system, its collective bargaining agreement, and its very identity into a much larger group of three other local unions. The adverse impact of such an order on the local union is clear and undeniable. The impact on Southern Stevedoring, the company which employs virtually all of the Local 1576 members is less obvious but no less severe. Working together, in a striking example of

labor-management cooperation, Southern Stevedoring and the members of Local 1567 have built a thriving business in unloading bananas at the port of Galveston. This business is seriously jeopardized by the Fifth Circuit's ruling because the court order requires Local 1576 to merge with three other locals which do only general stevedoring work. This dilution of a specialized workforce will mean that Southern Stevedoring will have to use untrained employees who are unfamiliar with the complex routine of unloading bananas. The negative impact of the court's order on this highly competitive and efficient business is truly incalculable.

The basis for the Fifth Circuit's merger order was its conclusion that the local ILA unions in the Texas Gulf ports are segregated by race and national origin and that this segregation denies the longshore workers equal job opportunities. Whatever may be said about the 36 other local unions under consideration in this lawsuit, it is clear that Local 1576 has not and does not now discriminate against any workers on the basis of race or national origin, and the District Court so found. Thus, inclusion of Local 1576 in the Fifth Circuit's merger order is without evidentiary support and is patently unfair. There is no doctrine of "guilt by association" under Title VII of the Civil Rights Act.

This Court should grant the petition for certiorari in this case in order to consider the novel remedy imposed by the Fifth Circuit. The propriety of merging local unions in a Title VII case has not been addressed by the Supreme Court. In this case, where the merger order is imposed on a local union which has not engaged in unlawful discrimination, and where the order will have a profound impact on both the members of Local 1576 and their employer, review by the Supreme Court is essential.

ARGUMENT

I. The Banana Trade is a Highly Competitive Business Which Demands an Efficient, Productive, and Knowledgeable Workforce in Order to Survive.

When a ship loaded with bananas docks at the port of Galveston, it is critical that those bananas be moved onto trucks quickly and efficiently for transportation to retail outlets. There are two reasons why efficiency is paramount. First, when the bananas are in the hold of the ship, they are refrigerated at 52 degrees. The trucks used to transport them are refrigerated at the same temperature. As long as the bananas are kept at this temperature they will neither freeze nor ripen. The only time when the bananas are outside this controlled environment is when they are being moved from the ship's hold to the trucks. If the exposure to the outside air is for any extended period of time, the bananas may be damaged. It is therefore essential that they be moved as quickly as possible.

The second reason for demanding a highly efficient unloading process is simply a matter of cost. Unloading bananas is a labor-intensive operation and in order to keep costs down it must be done quickly and without interruption. The ships are unloaded by one or two gangs of 52 men each. About half of those men are in the hold of the ship lifting boxes and putting them on a conveyor belt. There are men stationed at each level of the conveyor to ensure that the boxes keep moving. The conveyors bring the boxes up to the ship's deck and then off the ship onto the pier. At the pier, the remaining half of the gang moves the boxes off the conveyor and loads them onto trucks. Six trucks are loaded at one time and each must be packed according to a specific, pre-set pattern. There is no time to make mistakes — in order to keep the cost of this operation at

a competitive level, the boxes must come off the ship and be loaded onto the trucks at a rate of 3000 boxes per hour (50 boxes per minute).

The efficiency of this operation is not simply a matter of pride to the company. It is essential to maintain the business. As the president of Southern Stevedoring testified at a hearing before the District Court in this case, the banana companies always seek the lowest-cost port to unload their product. New Orleans used to handle a large amount of bananas but the companies left because the cost became too high. If the operation in Galveston becomes less efficient, the same thing could happen. The banana companies are already unloading some of their product at other ports in neighboring states, and Galveston is now in competition with those other ports to keep its share of the business.

Clearly, Southern Stevedoring needs experienced and hard-working employees to unload bananas in Galveston. The work is hard, physical labor and it permits no rest, relaxation, or interruption. In contrast to the other three ILA locals in Galveston, Local 1576 members continue working regardless of weather conditions. The other three locals stop work if it rains but continue to receive their regular hourly rate for the waiting time. Local 1576 members quit work only if Southern's superintendent and the 1576 business agent agree that conditions are hazardous or unsafe, and that has never happened. Southern Stevedoring must have a commitment from its employees to make the operation work. The company must have a specialized, experienced workforce which is willing to endure hardships. For over ten years, the members of Local 1576 have met and exceeded these requirements, and their work has been rewarded with a successful and thriving banana trade in Galveston.

II. The Fifth Circuit's Order Requiring Local 1576 to Merge With Three Other ILA Locals Will Reduce the Efficiency of Southern's Operations and Will Have a Serious Adverse Impact on the Company and Local 1576.

A. Southern Stevedoring Will No Longer Receive A Cohesive Group of Experienced Workers From The Union Hiring Hall.

Under the current system, Southern Stevedoring tells the leadership of Local 1576 how many workers it needs each day and the Local supplies that number from its hiring hall. The vast majority of these men have been working for Southern in the banana trade for years. They are familiar with how the unloading system operates and they know the importance of high productivity and carefully handling. If Local 1576 is merged with the other locals in Galveston there will be only one hiring hall and it will refer workers out in seniority order. With 500 workers in the other three locals and only 250 in Local 1576, it is obvious that the pool of trained banana workers will be seriously diluted. Indeed, the District Court found that most of the 1576 workers would be on the lower portion of a merged seniority list, so on days when the banana ships offer the only stevedoring work in Galveston, Southern Stevedoring may receive only a few, if any, experienced workers.

In a letter filed with the District Court on October 1, 1976, Ben Harris, the president of Southern Stevedoring, noted this potential problem:

> What will happen if the banana vessels represent 80% of the work in the port on any given call-out? With men being hired by

> seniority, we would probably have gangs of high seniority men, most of whom are not accustomed to working, with few men willing or capable of going into the hold or trucks to produce the necessary 3000 boxes per hour. This would create a chaotic condition and we would certainly not be discharging anything like our normal production.

With a merged local and a merged hiring hall, there would be little hope of reaching and maintaining the critical production rate necessary to keep the cost of unloading the boats at a competitive level. Because maintenance of the banana trade in Galveston is so dependent upon cost, there is a real danger that the work will be lost as a result of the court-ordered merger. Again, in Mr. Harris' words: "the answer is economics — business flows to the lower cost center. Anything tending to drive the cost of discharge up drives business away."

B. The Merger Will Deprive Local 1576 of the Business its Members have Worked so Diligently to Establish and, in Addition, Will Deprive Them of Their Chosen Collective Bargaining Representative and Their Separate Collective Bargaining Agreement.

The diffusion of the specialized workforce and the impact of that diffusion on the banana trade in Galveston would create serious problems for the members of Local 1576. To the extent that their seniority standing is diminished by the court-ordered merger they will have less opportunity to work and their earnings will decrease. If the merger results in even a marginal decrease in efficiency, Galveston could lose the banana trade entirely, thus reducing the number of jobs available and causing at least some of these employees to lose their earnings, their pension benefits,

and their health and welfare benefits. The harshness of these losses is obvious, but it is particularly cruel in this case because the members of Local 1576 have worked so hard over the years to build this trade and now are in danger of losing it through no fault of their own. As the District Court noted in its unpublished opinion:

> If merger is now allowed, Local 1576 members will find themselves at the bottom of the seniority list, and the other local members will be selected for the banana and green fruit work. Such a situation deprives the Local 1576 members of the fruits of their labors which they have cultivated for many years. There is a possibility also that with the disappearance of Local 1576 members from the banana trade, the banana industry might decide to take their business to a different port. This Court will not now countenance a decision which would give Locals 307, 329 and 851, without any claim of seniority in Local 1576, the benefits earned by Local 1576.

The court-ordered merger will also have significant ramifications for the right of Local 1576 members "to bargain collectively through representatives of their own choosing," a right bestowed upon them by section 7 of the National Labor Relations Act (NLRA). 29 U.S.C. § 157 (1970). These employees have always been represented by Local 1576. The Local was separately chartered by the ILA in 1937 as a "banana and green fruit" local. This separate charter and separate representation were consistent with the long-established holding of the NLRB that banana workers constitute an appropriate bargaining unit separate from general longshore workers. *See Mobile Steamship Association*, 8 NLRB 1297, 1313-14 (1938); *Aluminum Line*, 8 NLRB 1325, 1343-44 (1938). If the Fifth Circuit's order is implemented, this separate representation

consciously chosen by the members of Local 1576 will disappear because the necessary effect of the Court's order will be to merge the bargaining units as well as the local unions, The separate contract which Local 1576 has signed with Southern Stevedoring will be nullified. These employees will be merged with a much larger group of workers and their special interests will undoubtedly be subordinated to the will of that majority.

There are other employee rights under the NLRA which will also suffer under this court-ordered merger. The section 7 right to engage in collective activity is complemented by the right "to refrain from any or all of such activities . . . ." 29 U.S.C. § 157. Once the Local 1576 members are merged into the three other locals, they may well lose this option. The NLRB has repeatedly held that a decertification election can only be held within the certified or recognized bargaining unit. *See, e.g., W.T. Grant Co.,* 179 NLRB 670 (1969) and cases cited therein at footnote 2. A petition which seeks an election in only a portion of that unit will be dismissed without further consideration by the Board. Thus, if Local 1576 members are dissatisfied with their new "merged" union, they can effect a change or removal of that union only if a majority of the merged bargaining unit agrees with them. Again, the "new majority" will effectively dominate and control the current membership of Local 1576.

III. In Light of the District Court's Finding That Local 1576 did not Engage in Unlawful Discrimination, the Merger Order and its Attendant Adverse Consequences Cannot be Justified.

If there was specific evidence in this case that Local 1576 had discriminated against any racial or ethnic

groups by excluding them from membership or by referring workers to jobs in a discriminatory manner, then certainly the arguments set out above would be of little concern. One racial or ethnic group may not benefit by discriminating against another. But the evidence in this case demonstrates that Local 1576 did *not* discriminate against any longshoremen. The District Court specifically found that:

> Even though Local 1576 is predominantly Mexican-American, the evidence shows that it never discriminated against members of any racial group.

The evidence in the record shows that the members of Local 1576 have never been the victims of discrimination nor part of the system which created discrimination among the ILA locals in Galveston. The fact is that Local 1576 has always had a "separate identity" in terms of its union charter, its collective bargaining agreement, and its work jurisdiction. It has never been a signatory to the "Deep Sea Agreement" which governs the wages, hours and working conditions of the other three ILA locals. It has never done general stevedoring work; it handles only bananas and green fruit. If the members of Local 1576 wanted to do other work, they could and did work through the other locals. If the members of other locals wanted to unload bananas, they could and did work through the Local 1576 hiring hall. The record shows that Local 1576 never excluded any longshoremen who wanted to work. Indeed, the District Court found that the local had advertised over the radio in both English and Spanish in an effort to obtain additional longshoremen. This is not the action of a local union which excludes any ethnic or racial group from its membership.

In light of the District Court's finding that Local 1576 did not engage in discrimination, there is considerable question as to whether there is any legitimate basis for the Fifth Circuit's merger order. The Court of Appeals relied primarily on the "law of the case" doctrine, finding that in its 1975 decision it had already ordered the unions merged on the basis of a District Court finding that the segregation of the ILA locals throughout Texas "constitute[d] a pattern or practice depriving individuals of working opportunities, because of their race or national origin." *United States v. ILA*, 334 F. Supp. 976, 980 (S.D. Tex. 1971), *rev'd and remanded*, 511 F.2d 273, 280 (5th Cir.), *cert. denied*, 423 U.S. 994 (1975). Even assuming that the "law of the case" doctrine has some relevance to the Supreme Court's consideration of this petition,[1] it is clear that the Fifth Circuit's 1975 opinion and the District Court's 1971 opinion did not deal with the questions presented here. It is essential to recognize that the District Court's finding of a pattern or practice of discrimination was made in a case involving 37 different local unions in 10 different ports. 334 F. Supp at 977-78. The only portion of the District Court's 1971 opinion which specifically discussed Local 1576 did not indicate that 1576 had engaged in discrimination. On the contrary, the District Court indicated that the only restriction on the members of Local 1576 was imposed by the local's charter, which restricted them to banana and green fruit work. *Id.* at 981. There was no finding that the local excluded any longshoremen from performing this work.

A comparison of the District Court's 1979 opinion with its 1971 opinion reveals that the more recent opinion is much more complete in its consideration of the specific facts regarding Local 1576. This

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[1] *But see* Petition of Local 1576, ILA, for a Writ of Certiorari at 12 n.10.

individualized study of the Local was consistent with the Fifth Circuit's holding that segregated locals are not per se unlawful under Title VII. 511 F.2d at 280. The Court of Appeals indicated that a detailed study must be made to determine whether locals actually deny equal work opportunities. The District Court made such a study and found that Local 1576 had not engaged in unlawful discrimination, yet the Court of Appeals chose to substitute its own conclusion for that of the lower court on this point. This substitution was improper and imposed on the members of Local 1576 a novel remedial order they neither want nor deserve. The merger order should not, therefore, be permitted to stand.

CONCLUSION

Based on the facts and analysis set out above, the petition for a writ of certiorari in this case should be granted to permit Supreme Court consideration of whether the Fifth Circuit has properly exercised its remedial powers. Supreme Court review is essential here because the lower court's order infringes on important statutory rights, on the right of Local 1576 members to pursue their legitimate employment opportunities, and on Southern Stevedoring's ability to continue its business operations.

Respectfully submitted,

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